

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL J. NEWBERRY)	
Claimant)	
VS.)	
)	
STORMONT VAIL REG. MED. CTR.)	Docket No. 158,390
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE CO.)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

ON the 4th day of November, 1993, the application of the respondent for review by the Workers Compensation Appeals Board of an award entered by Administrative Law Judge Floyd V. Palmer on October 4, 1993, came on for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Terry E. Beck, of Topeka, Kansas. Respondent and insurance carrier appeared by their attorney, James C. Wright, of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Michael Broemmell, of Topeka, Kansas. There were no other appearances.

RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the award of the Administrative Law Judge.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the award of the Administrative Law Judge.

ISSUES

- (1) What is the nature and extent of claimant's disability and what is the appropriate amount of compensation, if any?
- (2) Is the claimant entitled to future medical expense?
- (3) Is claimant entitled to medical and prescription reimbursement?
- (4) Is claimant entitled to receive balance of underpayment of temporary total disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) As a result of a personal injury by accident which arose out of and in the course of the claimant's employment with the respondent, the claimant has lost fifty-eight percent (58%) of his ability to perform work in the open labor market and has lost forty percent (40%) of his ability to earn comparable wages. In considering both the reduction of the claimant's ability to perform work in the open labor market and his ability to earn comparable wages as required by Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), under the facts and circumstances of this particular case, the Appeals Board finds it should give greater weight to the loss of claimant's ability to perform work in the open labor market and finds and concludes that the claimant has sustained a fifty-eight percent (58%) permanent partial general work disability. See Schad v. Hearthstone Nursing Center, 16 Kan. App 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

The claimant, while working for the respondent on July 4, 1989, as a respiratory therapist, suffered a severe injury to his lower back when he was turning a large male patient in bed and he felt something pop in his low back.

The respondent first provided claimant with medical treatment through its emergency room physician. However, the emergency room physician, after examining the claimant, referred him to Dr. Michael McCoy, an orthopedic surgeon. Dr. McCoy examined the claimant and after reviewing X-rays, referred the claimant to Dr. Craig Yorke, a neurosurgeon. Dr. Yorke diagnosed the claimant as having a substantial right-sided L4-5 disc herniation and treated the patient conservatively for a short period of time. When the claimant failed to respond to conservative treatment, Dr. Yorke performed surgery on the claimant on August 16, 1989, which consisted of a right L4-5 hemi-laminectomy, discectomy and foraminectomy.

The claimant did not benefit from the operation and eventually was treated at the Kansas University Medical Center by Dr. Holladay. After a complete examination of the claimant which included X-rays and an MRI, Dr. Holladay on June 11, 1990, performed a right L3 partial laminectomy and L3-4 right-sided feraminctomy with removal of a bulging disc.

The claimant subsequently returned to Dr. Yorke for treatment, as the second surgery had actually worsened the claimant's condition. Dr. Yorke ordered a CT scan, bone scan and a myelogram, finding a large extradural defect on the right at L3-4, abnormal uptake in the area of the second surgery and high-grade stenosis at L3-4. Dr. Yorke concluded that the right L4 nerve root was still compressed which was causing the claimant right leg pain. Dr. Yorke recommended a third operation but the claimant elected not to undergo such operation. Dr. Yorke testified that if a third operation was performed, he did not know whether the claimant's impairment of function would improve and further he was of the opinion that claimant's impairment of function would not change much, even if the third operation relieved the claimant of leg pain.

Dr. Yorke last examined the claimant on July 18, 1991, at which time he rated the claimant as having a thirty-five percent (35%) permanent partial functional disability to the body as a whole. Dr. Yorke further testified in his deposition of April 28, 1992, that the claimant should avoid lifting over 25 pounds and should avoid repetitive bending and stooping.

Dr. McCoy took the claimant off of work on July 5, 1989, and the claimant has not returned to work for the respondent or any other employer since that date.

The claimant is a 53-year old male with a high school education, who attended college for a short period of time but did not successfully complete any semesters of college work. His past work experience consists of working as a telephone company employee, apprentice plumber, carpenter, and since 1980 he has been employed by the respondent in the respiratory therapy department. On the date of his accident, July 4, 1989, the claimant was working as a respiratory therapist and part of his job duties consisted of handling patients. This job requirement involved heavy work and awkward body positions when patients needed to be turned or lifted.

As a result of his work connected injury, the claimant has little reflex in his left leg and no reflex in his right leg. He is able to walk, but not very far and has trouble stubbing his toe on stairs. In order to stay comfortable during the day, the claimant alternates the activities of sitting, walking and laying down. The only productive activity that he is able to complete is to paint abstract paintings which he has shown at art shows, but has not been able to sell any of the paintings to date. The claimant is currently receiving Social Security Disability payments in the amount of \$693 per month.

The claimant is taking fourteen 100-milligram tablets of Darvocet daily for pain in his back and leg. The Darvocet was originally prescribed by Dr. Yorke and is presently prescribed by Dr. Robert Holmes, the claimant's family physician. He also is taking Tagamet for an ulcer and Prozac for depression. Both of these medications were being taken by the claimant prior to his back injury.

The claimant was evaluated by Michael D. O'Brien, a vocational consultant, at the request of the claimant's attorney on November 6, 1991. The purpose of such evaluation was to ascertain whether or not the claimant, as a result of his injury, had suffered a loss in his ability to perform work in the open labor market and ability to earn comparable wages. Mr. O'Brien personally interviewed the claimant, reviewed medical records and the claimant's Social Security Disability ruling. However, Mr. O'Brien in forming his opinion as to what, if any, work disability the claimant suffered, did not have the benefit of Dr. Yorke's permanent physical restrictions which he testified to in his deposition dated April 28, 1992. Mr. O'Brien using a computer program and adjusting the program's results of one-hundred percent (100%) loss of access to the open labor market, because of the claimant's artistic ability, expressed his opinion that claimant had experienced a ninety to ninety-five percent (90 to 95%) loss of ability to perform work in the open labor market. It was Mr. O'Brien's further opinion that the claimant's loss of ability to earn comparable wages was ninety percent (90%), and averaging these two factors in accordance with the Hughes decision, he concluded that the claimant's work disability was ninety to ninety-five percent (90 to 95%).

The respondent had the claimant evaluated by Monty D. Longacre, a vocational rehabilitation consultant, on June 9, 1992. Mr. Longacre interviewed the claimant and reviewed medical records of the claimant including the deposition of Dr. Craig Yorke, dated April 28, 1992. In his deposition, Dr. Yorke, claimant's treating physician, first testified as to claimant's physical limitations when he stated that the claimant should avoid lifting over twenty-five (25) pounds and he should avoid repetitive bending and stooping. He went on to further testify that the claimant could be gainfully employed as long as such employment fell within the

claimant's restrictions. Utilizing the Dictionary of Occupational Titles, Mr. Longacre determined that prior to the claimant's back injury he performed jobs in the heavy to very-heavy physical demand levels. Taking into consideration Dr. Yorke's restrictions, Mr. Longacre placed the claimant in the medium physical demand level. In Mr. Longacre's opinion, based on loss of jobs only and not loss of tasks, the claimant has lost fifty-eight percent (58%) of his ability to access jobs in the open labor market. He further testified that the claimant's ability to earn comparable wages had been reduced by twenty-six percent (26%). In arriving at the twenty-six percent (26%) loss of ability to earn comparable wages, Mr. Longacre used \$8.10 per hour earnings at time of injury compared to post-injury wages of \$6.00 per hour.

The Administrative Law Judge in this case found that the testimony of Mr. O'Brien, the vocational rehabilitation consultant, was better reasoned and more persuasive than the evidence presented by Mr. Longacre, also a vocational rehabilitation consultant. The Appeals Board, however, after carefully reviewing both of the consultants' opinions and the methods used to form such opinions, especially in light of the fact that Mr. O'Brien's opinion was formed without the benefit of Dr. Yorke's restrictions, finds the testimony of Mr. Longacre more credible and more persuasive. Mr. Longacre in forming his opinion as to the loss of claimant's ability to earn comparable wages, used a pre-injury wage of \$8.10 per hour. The parties to this action stipulated that the average weekly wage of the claimant at the time of injury was \$398.35 per week or \$9.96 per hour. Using \$9.96 per hour as a pre-injury wage, then the correct calculation of claimant's loss of ability to earn comparable wages is forty percent (40%).

In reviewing awards of the Administrative Law Judge, the Appeals Board has the authority to grant or refuse compensation, or to increase or to diminish any award of compensation or to remand any matter to the Administrative Law Judge for further proceedings. 1993 Session Laws of Kansas, Chapter 286, Section 53. (b)(1).

The Appeals Board having considered both the claimant's loss of ability to perform work and earn comparable wages in the open labor market, as required by Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), in addition to the whole record in this case, finds and concludes by giving greater weight to the loss of claimant's ability to perform work in the open labor market that the claimant is entitled to a fifty-eight percent (58%) permanent partial general work disability award. See Schad v. Hearthstone Nursing Center, 16 Kan. App 2nd 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). The Appeals Board, as the trier of fact, has the ultimate decision concerning the extent and nature of the disability, and such decision must be based on the evidence presented. However, the trier of fact is not bound by the medical evidence presented in the case and has the responsibility of making its own determination. The trier of fact's function is to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App 2nd 782, 785-786, 817 P.2d 212 (1991).

The respondent argues that if work disability is awarded in this case, a previous back injury the claimant suffered in 1987 and subsequently settled in a workers compensation case in 1988, based on functional impairment, should account for ninety percent of the 1989 work disability. The 1987 back injury did not result in a work disability award. The evidence in the record indicates that the claimant returned to his same job with the same pay as he had prior to the 1987 injury. Pursuant to K.S.A. 1992 Supp. 44-510(a), there is a presumption that an employee who engages in any work for wages comparable to those earned before the accident has no work disability. In addition, there is no medical evidence in the record which showed what, if any, contribution the 1987 injury made to the 1989 injury.

The claimant sets forth additional argument that the proper award to be made in this case should be permanent total disability as defined in K.S.A. 1992 Supp. 44-510c(a)(2). However, Dr. Yorke, the treating physician, establishes that the claimant could be gainfully employed in a job with job duties that are within his restrictions. The claimant also possesses potential artistic skills for employment opportunities.

(2) The claimant should be provided future medical treatment with Dr. Yorke or his family physician for monitoring of his prescription medication. He should be awarded future medical treatment for his low back condition upon application to the Director.

The claimant has established through his testimony that he has continued pain and has need of future prescription medications for such pain. Dr. Yorke has recommended a third back operation even though the claimant has not agreed to such operation at this time, with continuing and increasing pain symptoms, the claimant could change his mind in reference to such operation.

(3) The claimant is awarded medical reimbursement for out-of-pocket expenses in the form of prescription cost of Darvocet as shown in claimant's Exhibit No. 1 to the regular hearing.

The claimant testified that the Darvocet is taken fourteen times daily at 100-milligrams per tablet for pain in his back and his leg. The claimant did not prove that the respondent is responsible for the prescriptions of Tagamet and Prozac, as they were prescribed prior to his back injury.

(4) The claimant is entitled to underpayment of temporary total disability compensation due to an incorrect average weekly wage, and the correct amount is shown in the calculation of the award.

The claimant was previously paid 109 weeks of temporary total disability at the rate of \$233.05 per week or \$25,402.45. The parties have stipulated to an average weekly wage of \$398.35 which would make the correct temporary total disability weekly rate in the amount of \$265.58 for 109 weeks or \$28,948.22.

(5) Physical restoration is denied as claimant has failed to carry his burden of proof for this claim.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Floyd V. Palmer dated October 4, 1993, is decreased with respect to the award of compensation as it relates to the percent of permanent partial general disability and such award of compensation is hereby entered in favor of the claimant, Michael J. Newberry, and against the respondent, Stormont Vail Regional Medical Center, and the insurance carrier, Liberty Mutual Insurance Company.

(1) The claimant is entitled to 109 weeks temporary total disability at the rate of \$265.58 per week, or \$28,948.22, followed by 306 weeks at \$154.04 per week, or \$47,136.24, for a fifty-eight percent (58%) permanent partial general bodily disability making a total award of \$76,084.46. As of October 4, 1993, there would be due in owing to the claimant 109 weeks temporary total compensation at \$265.58 per week in the sum of \$28,948.22, plus 113 weeks permanent partial compensation at \$154.04 per week in the sum of \$17,406.52, for a total due in owing of \$46,354.74, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$29,729.72 shall be paid at \$154.04 per week for 193 weeks or until further order of the Director.

(2) The claimant is awarded reimbursement for prescription expense for Darvocet as shown in claimant's Exhibit No. 1 to the regular hearing.

(3) The claimant is awarded future medical without application with Dr. Craig Yorke and his family physician for monitoring and prescribing medications to control his pain, together with such medications as are so prescribed. Future physical therapy or surgical intervention shall be upon application to the Director.

(4) The Kansas Workers Compensation Fund shall bear eighty percent (80%) of the total award herein.

(5) Pursuant to K.S.A. 44-536, the claimant's contract of employment with Terry E. Beck, his counsel, is hereby approved.

(6) Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed against the respondent and insurance carrier to be paid direct as follows:

APPINO & ACHTEN REPORTING SERVICE

Transcript of Regular Hearing, Dated May 12, 1992	
Deposition of Monty D. Longacre, Dated August 7, 1992	\$ 384.10

CURTIS SCHLOETZER HEDBERG FOSTER & ASSOC.

Deposition of Michael J. Newberry, Dated May 27, 1992	\$ 235.00
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NORA LYON & ASSOCIATES, INC.

Deposition of Craig H. Yorke, M.D., Dated April 28, 1992	\$ 88.50
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CAROL A. MEGGISON, C.S.R.

Deposition of Michael D. O'Brien, M.A.E.D., CVE, CRC Dated February 19, 1992	\$ 216.80
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IT IS SO ORDERED.

Dated this ____ day of December, 1993.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Terry E. Beck, Attorney for Claimant, 1243 SW Topeka Blvd., Ste. B., Topeka, KS 66612
James C. Wright, Attorney for Respondent, 1400 Bank IV Tower, Topeka, KS 66603
Michael Broemmel, Attorney for the Workers Compensation Fund, 112 SW 6th, Ste. 508, Topeka,
KS 66603
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director